



Control Number: 51812



Item Number: 178

Addendum StartPage: 0

PROJECT NO. 50500

PETITION FOR DESIGNATION OF § PUBLIC UTILITY COMMISSION  
ELECTRIC PROVIDERS OF LAST §  
RESORT FOR 2021-2022 AND § OF TEXAS  
SUBMISSION OF LARGE SERVICE §  
PROVIDER ELECTRICITY FACTS §  
LABELS §

PROJECT NO. 51812

ISSUES RELATED TO THE STATE OF § PUBLIC UTILITY COMMISSION  
DISASTER FOR THE FEBRUARY 2021 §  
WINTER WEATHER EVENT § OF TEXAS

**EXELON GENERATION COMPANY, LLC'S MOTION FOR REHEARING OF  
FEBRUARY 19 ORDER DELEGATING AUTHORITY TO THE EXECUTIVE  
DIRECTOR AND GRANTING EXCEPTION TO COMMISSION RULES**

TO THE HONORABLE COMMISSIONERS:

Exelon Generation Company, LLC ("Exelon")<sup>1</sup> respectfully files this Motion for Rehearing ("Motion") of a discrete ruling contained in the Public Utility Commission of Texas ("Commission" or "PUCT") Order Delegating Authority to the Executive Director and Granting Exception to Commission Rules issued on February 19, 2021 ("Order").<sup>2</sup> The Order was issued *sua sponte* and did not follow rulemaking or contested case procedures under the Texas Administrative Procedure Act ("Administrative Procedure Act" or "APA").<sup>3</sup> Out of an abundance of caution and to preserve its rights to judicial review, Exelon submits this Motion pursuant to

<sup>1</sup> Exelon Generation Company, LLC, through subsidiaries, owns 3,620 MWs of gas-fired capacity and 87 MWs of wind power in Texas. Exelon's subsidiary, Constellation New Energy, Inc., also provided approximately 14 TWh of competitive retail supply to residential and commercial/industrial load in 2020. Exelon Generation Company, LLC also provides wholesale supply to a number of Texas cooperatives and municipalities.

<sup>2</sup> PUCT Project No. 50500, *Petition for Designation of Electric Providers of Last Resort for 2021-2022 and Submission of Large Service Provider Electricity Facts Labels*, and PUCT Project No. 51812, *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Delegation of Authority to the Executive Director and Granting Exception to Commission Rules (Feb. 19, 2021) ("Commission's Order").

<sup>3</sup> Tex. Gov't Code §§ 2001.001-.903.

APA § 2001.146 and Public Utility Commission of Texas (“Commission” or “PUC”) Procedural Rule § 22.264 to request reconsideration of that portion of the Order that placed a moratorium on mass transitions of the customers of defaulting retail electric providers (“REPs”) for the period of February 19 to February 24, 2021 in so far as that decision caused and/or exacerbated uplift to all market participants due to defaults in the market caused by the PUC’s February 15 and 16 repricing orders.<sup>4</sup>

Exelon does not dispute that the Order was intended to respond to an imminent risk that customers of defaulting REPs could be forced to pay extraordinary electricity charges after being transitioned to Provider of Last Resort (“POLR”) service while energy prices were high following the Commission’s unilateral decision to administratively set prices at \$9,000 /MWh in its February 15 and 16 repricing orders. Exelon notes, however, that if the Commission’s concern was the possibility of customers being transitioned to an indexed rate, which is one of the pricing options that a non-voluntary POLR provider may select, it could have easily and with far fewer ramifications for the market as a whole, eliminated that pricing option for transitioning customers for a set period of time after transition. Specifically, it could have simply suspended the POLR index calculation in 25.43(m)(2) thereby requiring all LSPs and VREPs to serve acquired customers on a market-based month-to month product, without delaying mass transitions for multiple days to accommodate new VREPs.

Exelon files this Motion out of an abundance of caution to preserve error and because the Order could impose significant default uplift obligations on a market already suffering under substantial defaults, and there is no record that the Commission was aware of, or considered, these

---

<sup>4</sup> *Oversight of the Electric Reliability Council of Texas*, Project No. 51617, Order Directing ERCOT to Take Action and Granting Exception to Commission Rules (Feb. 15, 2021); Project No. 51617, Second Order Directing ERCOT to Take Action and Granting Exception to Commission Rules (Feb. 16, 2021).

potential impacts. Exelon accordingly recommends the Commission consider the effect that delaying mass customer transitions has on the aggregate amounts that defaulting REPs would owe ERCOT and the resulting impact that has on all market participants through the default uplift process. Exelon urges the Commission to reconsider this aspect of its Order by opening a rulemaking, project and/or evidentiary proceeding to determine the impact of a POLR transition delay on default uplifts, and consider what can be done to shield non-defaulting market participants from the impact of the Commission's Order.<sup>5</sup> Exelon also files this Motion to preserve its right to judicial review of the Commission's action.

### **BACKGROUND**

On February 19, 2021, Commission staff submitted a memorandum in Docket 50500 explaining that:

[Non-voluntary POLR providers ("LSPs")] may charge a maximum rate for the POLR service based on a formula that includes the real time settlement point prices that can be up to \$9.00 per kilowatt hour resulting in extremely high prices for customers. [Voluntary POLR providers ("VREPs")] on the other hand are required by 16 TAC § 25.43(m)(1) to provide service to customers using a market-based, month-to-month product.<sup>6</sup>

Commission staff recommended, therefore, that the Commission waive the deadline for submitting a request to be designated as a VREP and give staff authority to administratively approve new

---

<sup>5</sup> This additional process should be combined with any other process that the Commission establishes to consider the issue of collection of default uplift costs. Exelon is submitting under separate cover today a request for reconsideration of the Commission decision, issued on February 21, 2021, to award ERCOT discretion to disregard the current rules applicable to default uplift. In Exelon's view, it would be appropriate to combine the further proceedings.

<sup>6</sup> PUCT Project No. 50500, *Petition for Designation of Electric Providers of Last Resort for 2021-2022 and Submission of Large Service Provider Electricity Facts Labels*, Memorandum from Commission Staff Cliff Crouch and Creighton McMurray to Office of Policy and Docket Management (Feb. 19, 2021); *see also* 16 Tex. Admin. Code §25.43(m) (describing rates applicable to POLR service).

VREP applications in an effort to ensure that customers of defaulting REPs could be served by VREPs at market-based rates, rather than being served by LSPs at rates indexed to real-time wholesale settlement prices.<sup>7</sup> Commission staff further recommended that the Commission set a new deadline of February 22, 2021 for LSPs to request VREP status, and recommended that “POLR transitions should not begin before Wednesday, February 24, 2021 so that acquisitions can begin and all VREPs will be in place.”<sup>8</sup> The same day, the Commission, on its own motion and without the opportunity for notice and comment, issued an order in response to Commission Staff’s memorandum that adopted each of Commission staff’s recommendations. The Order provided, in pertinent part:

1. The Commission waives the July 31 deadline to submit a request to be designated as a VREP.

...

3. Any currently designated LSP may submit a request to be designated a VREP by Monday, February 22, 2021 by 3:00 p.m.

4. The Commission delegates authority to the executive director to approve a timely request by an LSP to be designated a VREP if the LSP files sufficient information to demonstrate its capability to serve the additional ESI IDs it requests without seeking additional good cause waivers.

5. The delegations to the executive director in this Order may not allow transitions to POLR service before Wednesday, February 24, 2021.<sup>9</sup>

Thus, the Order both extended the period for submitting a request to be designated as a VREP, and also halted all ongoing efforts to transition customers to POLR service while the Commission received and reviewed additional applications for VREP designation. Issued on February 19, it appears that the Order may have delayed mass transitions to POLR by up to five days, during

---

<sup>7</sup> PUCT Project No. 50500, Memorandum from Commission Staff (Feb. 19, 2021).

<sup>8</sup> *Id.*

<sup>9</sup> Commission’s Order at p. 2.

which period defaulting retail providers would have continued to accrue liabilities to ERCOT for serving their customers' loads. Those liabilities may now be imposed on remaining market participants as default uplifts under ERCOT Nodal Protocol § 9.19. Combined with the Commission's administrative pricing orders issued on February 15 and 16, which already have caused more than \$3 billion in defaults by market participants as of March 11, 2021, and the Commission's Order eliminating the \$2.5 million cap on default uplift charges permitted by the ERCOT Protocols, the additional default amounts accrued during the POLR mass transition moratorium threatens harm to other market participants, including Exelon. Absent an investigation, there is no way to determine at this time whether the Commission's Order delayed any mass transitions to POLR, or the financial impacts of those delays, because ERCOT thus far has not been transparent with respect to its negotiations with defaulting counterparties, or its short-pay and uplift expectations.

Exelon, accordingly, urges the Commission to reconsider this aspect of its order and to open a rulemaking, project or evidentiary proceeding so that the complex matters of POLR transition rates and default uplifts can be addressed by the Commission in due course, in substantial compliance with its rules, and upon a reasoned agency record. Exelon also files this Motion to preserve its right to judicial review of the Commission's action.

#### **LEGAL ANALYSIS AND POINTS OF ERROR**

The Commission's February 19 Order placed a hold on mass transitions of customers to POLR, which may have increased the default uplift obligations that will be imposed on ERCOT market participants, and did so without any opportunity for public comment, hearing, or presentation of evidence or argument. As described below, the Order was issued through an unlawful procedure in excess of the Commission's statutory authority; did not substantially comply with the Administrative Procedure Act; violated affected parties' due process rights; and

the decision that it reached was not in substantial compliance with the APA or reasonably supported by substantial evidence.

**A. Point of Error 1: The Order Was Made Through Unlawful Procedure Because It Was Not Adopted Under Any Process Described in the Administrative Procedure Act or PURA.**

Under the Texas Administrative Procedure Act, state agencies are charged with providing an opportunity for public participation in the rulemaking process and providing an opportunity for hearing and participation in any contested case proceeding that determines the legal rights, duties or privileges of a party.<sup>10</sup> PURA § 39.003 confirms the scope of the Commission’s authority to act within the competitive power market, stating: “Unless specifically provided otherwise, each commission proceeding under [Chapter 39 of PURA], other than a rulemaking proceeding, report, notification, or registration, shall be conducted as a contested case.”<sup>11</sup>

PUCT Substantive Rule § 25.43 describes the process by which customers of a defaulting REP are to be transitioned to POLR providers. It provides, in relevant part:

On the occurrence of one or more of the following events, ERCOT shall initiate a mass transition to POLR providers, of all of the customers served by a REP:

(A) Termination of the Load Serving Entity (LSE) or Qualified Scheduling Entity (QSE) Agreement for a REP with ERCOT;

(B) Issuance of a commission order recognizing that a REP is in default under the TDU Tariff for Retail Delivery Service;

(C) Issuance of a commission order de-certifying a REP;

(D) Issuance of a commission order requiring a mass transition to POLR providers;

(E) Issuance of a judicial order requiring a mass transition to POLR providers; and

---

<sup>10</sup> See Tex. Gov’t Code §§ 2001.001, 2001.0003(1), 2001.029, 2001.051.

<sup>11</sup> Tex. Util. Code § 39.003.

(F) At the request of a REP, for the mass transition of all of that REP's customers.<sup>12</sup>

ERCOT's Retail Market Guide § 7.11.1 also describes the process and timeline for initiating and processing a mass transition of customers to POLR service. Neither the PUCT's Substantive Rules nor ERCOT's rules provide for a suspension of the mass transition process while new VREP applications are considered. The Commission's Order was issued through a procedure that exceeds the Commission's statutory authority because, as explained further below, the Order essentially adopted a new administrative rule and determined the legal rights of market participants without complying with either rulemaking or contested case procedures. As such, the Order is unlawful, exceeds the Commission's statutory authority, and should be reconsidered by the Commission, in whole or in part, on that basis.

**B. Point of Error 2: The Commission Failed to Substantially Comply with the Administrative Procedure Act's Rulemaking Procedures and Violated its Own Procedural Rules With Respect to Rulemaking**

The Order appears to have prohibited POLR transitions during the period of February 19 through February 24, 2021. There is no provision for such a moratorium in either the PUCT's Substantive Rules or ERCOT's rules. As such, the Order may properly be characterized as adopting a new administrative rule. The Commission must adopt any new administrative rules, as well as amendments to existing rules, pursuant to the rulemaking processes set forth in the APA and the Commission's Procedural Rules.<sup>13</sup> The Commission may initiate a rulemaking on its own

---

<sup>12</sup> 16 Tex. Admin. Code § 25.43(p)(10). We note that ERCOT has not indicated at what point it may have terminated the LSE or QSE agreement of any REP that defaulted in the days following the winter storm, or when any of those REPs may have requested mass transition of their customers. However, either of these events could have triggered a mass transition process that was delayed by the Commission's Order pursuant to 16 Tex. Admin. Code § 25.43(p)(10).

<sup>13</sup> See generally APA Subchapter B, *Rulemaking*; see also Tex. Gov't Code §§ 2001.003(6) (defining "rule" as including "the amendment or repeal of a prior rule"). We also note that The Governor's February 12 emergency proclamation does not permit the Commission to deviate from the APA. That proclamation provided for the suspension of regulatory statutes, orders or rules of a state agency "upon written approval of the Office of the



motion by publishing notice of the proposed rule in accordance with the APA, which requires that public notice be provided at least 30 days prior to adopting the proposed rule and that the proposed rule be filed with the Secretary of State for publication in the *Texas Register*.<sup>14</sup> The Commission must afford all interested persons a reasonable opportunity to submit data, views and arguments in the form of written comments on the rule, and must grant a public hearing if requested by 25 persons, a governmental subdivision or agency, or an association with at least 25 members.<sup>15</sup>

A rule is voidable unless a state agency adopts it in substantial compliance with the procedures described above.<sup>16</sup> The new rule imposed by the Order does not meet this substantial compliance standard. Market participants received no notice of the proposed rule and had no opportunity to submit written comments or participate in a public hearing on its adoption.<sup>17</sup> As a result, the rule change directed by the Order was not adopted in substantial compliance with the Administrative Procedure Act.

The lack of clear process also disrupts market participants' rights to obtain judicial review. For PUCT rule changes, the normal appellate process is to bring a declaratory judgment action asking a court to determine "the validity or applicability of a rule, including an emergency rule" adopted pursuant to the APA.<sup>18</sup> PURA § 39.001(f) further prescribes: "[a] person who challenges the validity of a competition rule must file a notice of appeal with the court of appeals and serve the notice on the commission not later than the 15th day after the date on which the rule as adopted

---

Governor." There is no record evidence or other indication that Commission requested or obtained written approval of the Governor to suspend the normal operation of the APA before issuing the Order.

<sup>14</sup> Tex. Gov't Code § 2001.023; 16 Tex. Admin. Code §§ 22.281(b), 22.282(b).

<sup>15</sup> Tex. Gov't Code § 2001.029; 16 Tex. Admin. Code § 22.282(c),(d).

<sup>16</sup> See Tex. Gov't Code § 2001.035 ("A rule is voidable unless a state agency adopts it in substantial compliance with Sections 2001.0225 through 2001.34.").

<sup>17</sup> While the Commission can bypass the prior notice and comment requirements of APA §§ 2001.023 and 2001.029 by adopting an emergency rule pursuant to APA § 2001.034 and PUCT Procedural Rule § 22.283, the Order did not follow the procedural requirements of an emergency rulemaking because it not contain the required finding to support the adoption of an emergency rule, and there has been no publication thereof in the *Texas Register*.

<sup>18</sup> Tex. Gov't Code § 2001.038.

is published in the Texas Register.” In the face of an agency order that failed to clearly follow either rulemaking or contested case procedures, it is imperative that the Commission reconsider the Order in light of the potentially serious consequences thereof.

**C. Point of Error 3: The Commission Violated APA § 2001.051 and its Own Procedural Rules With Respect to Contested Cases, Acted in Excess of Its Statutory Authority, and Followed an Unlawful Procedure**

A state agency may also issue a final order affecting the rights of parties in a contested case proceeding conducted in accordance with the APA. Nonetheless, the Commission’s issuance of the Order was not preceded by any of the primary features of a contested case; there has been no opportunity for interested parties to participate in a hearing or to respond and present evidence and argument, each of which are required under APA § 2001.051. No factual record was developed to support the decisions made in the Order. Nor did the Order contain the required elements of a final order in a contested case, as it does not include “findings of fact and conclusions of law, separately stated.”<sup>19</sup> Nor did the Order issue in a Commission docket styled as a contested case, but rather it was filed in a “project” dockets with the captions, “Issues Related to the State of Disaster for the February 2021 Winter Weather Event” and “Petition for Designation of Electric Providers of Last Resort for 2021-2022 and Submission of Large Service Provider Electricity Facts Labels.” As such, the Commission violated APA § 2001.151 by issuing an order that may affect Exelon’s and others’ rights without providing the right to participate in a hearing or present evidence and argument, and in doing so the Commission exceeded its statutory authority as a state agency and instead followed an unlawful procedure when it issued the Order.

---

<sup>19</sup> Tex. Gov’t Code § 2001.141 (b); 16 Tex. Admin. Code § 22.263(2).

**D. Point of Error 4: The Order Violates the Due Process Rights of ERCOT Market Participants, Who Have a Right to Comment and Hearing, or at a Minimum, to Judicial Review, and is Not Reasonably Supported by Substantial Evidence**

As explained above, the Commission did not follow the procedures set forth in the Administrative Procedure Act in issuing the Order. Generators, retail electric providers, marketers and cooperatives may be impacted by the Commission's decision had no opportunity to comment on that decision, no opportunity for a hearing, and no opportunity to present evidence or arguments. In addition, the right of affected parties to seek judicial review of the Commission's Order has been fundamentally jeopardized because the Commission has neither clearly issued a final, appealable order nor has it properly promulgated a new rule, leaving parties to guess what process they can follow to obtain review of the Commission's actions.

Procedural due process "at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner" before a person can be deprived of a vested property interest.<sup>20</sup> Property interests protected by due process include, at the very least, ownership of money.<sup>21</sup> By denying Exelon and others the opportunity to provide written comments or arguments prior to issuing the Order, and by now impairing their right to judicial review in acting outside of any authorized procedure, the Commission has violated those parties' right to procedural due process. Moreover, the Commission's decision is not reasonably supported by substantial evidence because there is no record evidence to suggest that the Commission considered the substantial impact that delaying POLR transitions may have on other market participants.

It is imperative that the Commission reconsider its Order and provide affected market participants a clear pathway to judicial review. The Commission should also open a rulemaking or other project to receive input on how to address POLR transitions during periods of high market

---

<sup>20</sup> *Mosley v. Texas Health & Hum. Servs. Comm'n*, 593 S.W.3d 250, 265 (Tex. 2019) (internal quotation omitted).

<sup>21</sup> *Matzen v. McLane*, 604 S.W.3d 91, 113 (Tex. App.—Austin, 2020).

prices in the future. In addition, we ask that the Commission open an investigation or other project to determine whether the Commission's Order increased the amount of defaulting REPs' liabilities to ERCOT and to consider interested parties' comments and arguments with respect to the appropriate timing and process for market settlements and default uplifts, which is a focus area that was suggested in the Commission Deputy Executive Director's memorandum dated March 10, 2021.<sup>22</sup> The Commission and the ERCOT market as a whole will benefit from carefully considering all options and crafting a solution that will not impose an unnecessary burden on the non-defaulting market participants and consumers.

### **CONCLUSION**

The Commission should reconsider its decision to delay POLR transitions, which is likely to have significantly increased the amount of default uplift charges that will be imposed on non-defaulting market participants. Considering the unprecedented defaults reported by ERCOT and the Commission's separate decision to eliminate the cap on monthly default uplifts, the impact of delaying POLR transitions should be considered by the Commission in an open, public process, consistent with the APA and the Commission's own rules.

For the foregoing reasons, Exelon respectfully requests that the Commission open a rulemaking, project and/or evidentiary proceeding to determine the impact of a POLR transition delay on default uplifts and to consider matters related to ERCOT market settlements and default uplifts, including ways to mitigate the impact of default uplifts on non-defaulting market participants.

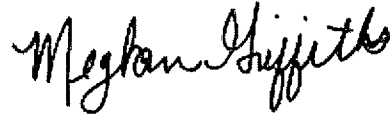
---

<sup>22</sup> PUCT Docket No. 51812, *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Open Meeting Cover Sheet from Connie Corona to Chairman D'Andrea dated March 10, 2021.

Exelon also requests all other relief to which it may be entitled.

Respectfully submitted,

JACKSON WALKER L.L.P.



---

Meghan Griffiths  
State Bar No. 24045983  
Jennifer Ferri  
State Bar No. 24065224  
100 Congress Avenue, Suite 1100  
Austin, TX 78701  
(512) 236-2363  
(512) 391-2163 (Fax)  
mgriffiths@jw.com  
jferri@jw.com

COUNSEL FOR EXELON GENERATION  
COMPANY LLC

### **CERTIFICATE OF SERVICE**

I certify that notice of the filing of this document was provided to all parties of record via electronic mail on March 18, 2021, in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ Jennifer Ferri  
Jennifer Ferri